

07CV646-J / 03CR1217-J

1 money received from those sales would be used to buy television time to advertise products
2 that would generate profits for investors. (*Id.*) In fact, Commercial had only minimal
3 product sales and no profits. (*Id.*) The company used the money it received from later
4 investors to pay earlier investors and its own overhead and expenses. (*Id.*)

5 Petitioner participated in marketing the Media Units and Equity Participations,
6 which were not registered as required by securities laws and which were fraudulently
7 described to investors as legitimate investments. (*Id.* at 4-5.) Petitioner operated Nexgen
8 Financial (“Nexgen”), which was located in Del Ray Beach, Florida. (*Id.* at 5.) Nexgen
9 marketed Commercial via mailings and telemarketing. (*Id.* at 6.) Petitioner and Nexgen’s
10 salespeople promised investors large returns on their investments from profits earned on
11 product sales. (*Id.* at 6.) As the operator, Petitioner shared in the commissions earned by
12 Nexgen’s salespeople. (*Id.*)

13 On May 1, 2003, Petitioner was charged in a seven-count information with various
14 offenses relating to securities fraud. [Doc. No. 1.] Pursuant to a written plea agreement,
15 Petitioner pled guilty to the seven counts, which included conspiracy to commit securities
16 fraud, securities fraud, mail fraud, and wire fraud. [Doc. No. 5.] Under the terms of the
17 plea agreement, Petitioner agreed to waive the right to appeal or to collaterally attack the
18 plea, conviction, or sentence unless the Court imposed a sentence in excess of the high end
19 of the guideline range based on an adjusted offense level of 23. (*See* Plea Agreement at 15,
20 21.) The plea agreement provided that the parties would jointly recommend a base offense
21 level of 6, a 14-level upward adjustment due to the amount of loss caused by Petitioner’s
22 offense, a two-level upward adjustment due to the fact that the offense involved more than
23 minimal planning, a two-level upward adjustment due to the vulnerable nature of her
24 victims, a two-level upward adjustment due to her supervisory role in the offense, and a
25 three-level downward adjustment due to her acceptance of responsibility. (*Id.* at 15.) The
26 Government agreed to recommend a sentence at the low end of the guideline range found
27 by the Court, unless the Court adopted an offense level or downward adjustment or
28 departure below the Government’s recommendation in the plea agreement. (*Id.* at 17.)

1 The Court sentenced Petitioner on March 24, 2006. [Doc. No. 27.] The Court
2 followed the recommendations of the parties and found a base offense level of 6, applied
3 the parties' recommended adjustments, and applied a three-level downward adjustment
4 based upon the Government's motion pursuant to U.S.S.G. § 5K1.1. (Rep.'s Tr. of
5 Sentencing at 12.) This resulted in an adjusted offense level of 20 and a guideline
6 sentencing range of 41 to 51 months in custody. (*Id.*) Petitioner was sentenced to a term of
7 imprisonment at the low end of the range, 41 months. (*Id.*) On April 9, 2007, Petitioner
8 filed the instant Petition. [Doc. No. 38.]

9 *Discussion*

10 The bulk of Petitioner's Petition focuses on her ineffective assistance of counsel
11 claims. (Pet. at 2.) Petitioner asserts that her counsel was ineffective for telling her that
12 she "would only miss one Christmas away from home" and for failing to adequately
13 explain the calculation of criminal history points to her. (*Id.*) Additionally, Petitioner
14 asserts that her counsel improperly advised her that she would receive the same sentence as
15 co-defendant Bill Whitely. (*Id.*) Petitioner also asserts that her counsel was ineffective for
16 failing to object to: (1) the fourteen-point enhancement she received due to the amount of
17 loss caused by her offense; (2) the two-point enhancement she received due to the
18 vulnerable nature of her victims; and (3) the two-point enhancement she received due to her
19 supervisory role in the offense. (*Id.* at 2-3.) In addition to her ineffective assistance of
20 counsel claims, Petitioner asserts that "the U.S. Attorney violated HOGAN'S constitutional
21 rights by the misuse of the Patriots [sic] Act in this case." (*Id.* at 3.) Finally, Petitioner
22 asserts that the sentencing enhancements she received violated her Sixth Amendment right
23 to trial by jury. (*Id.* at 3-4.)

24 In its Response, the Government argues that the Petition must be denied because: (1)
25 Petitioner had ample opportunity to object to the sentencing enhancements at her
26 disposition or sentencing hearing, and she failed to do so; (2) Petitioner waived her right to
27 collaterally attack her sentence as part of her plea agreement; (3) Petitioner received
28

effective assistance of counsel; and (4) judicial fact-finding in sentencing is constitutional.¹ (Gov't Resp. at 17-23.) The Court examines each of these arguments in turn.

I. Petitioner's Failure to Object to the Sentencing Enhancements

As a preliminary matter, the Court must address the Government's argument that Petitioner has waived the claims in her Petition because she failed to raise these issues at her disposition hearing or sentencing hearing. Specifically, the Government argues that Petitioner waived her claims challenging the Court's imposition of the sentencing enhancements because she failed to object to the inclusion of the enhancements during her disposition hearing or her sentencing hearing. (*Id.* at 17.)

A § 2255 petitioner cannot challenge nonconstitutional sentencing errors if such errors were not challenged in an earlier proceeding. *United States v. McMullen*, 98 F.3d 1155, 1157 (9th Cir. 1996) (citing *United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1995); *United States v. Keller*, 902 F.2d 1391, 1393 (9th Cir. 1990)). A petitioner waives the right to raise nonconstitutional claims in collateral proceedings unless she makes a proper objection before the district court or in a direct appeal from the sentencing decision. *Id.* (citing *Schlesinger*, 49 F.3d at 483; *Keller*, 902 F.2d at 1393.) In contrast, courts typically permit constitutional questions to be raised collaterally even though they could have been raised on direct appeal. *See Schlesinger*, 49 F.3d at 485 (citing *Vandergrift v. United States*, 313 F.2d 93, 95 (9th Cir. 1963)).

Petitioner did not raise any of the claims presented in her Petition in an earlier proceeding. However, the Court still can entertain the claims if they present constitutional issues. *See id.* Ineffective assistance of counsel is a constitutional violation, so no forfeiture of Petitioner's ineffective assistance of counsel claims results from her failure to raise them at an earlier proceeding or on appeal. *See McMullen*, 98 F.3d at 1157-58.

¹ The Government also notes that Petitioner's Petition violates the Rules Governing § 2255 Proceedings in the United States District Courts because it is not signed under penalty of perjury. (Gov't Resp. at 18 n.29) Rather, the words "Respectfully submitted" appear above Petitioner's signature on the Petition. (Pet. at 5.) Accordingly, Petitioner's Petition could be stricken for failure to comply with the requirement that it be signed under penalty of perjury. However, as discussed below, this issue is moot because the Petition fails for other reasons.

1 Similarly, Petitioner's claim that she was denied her right to trial by jury raises
2 constitutional issues, so the Court can entertain this claim. Finally, Petitioner's claim that
3 her constitutional rights were violated by misuse of the Patriot Act presents a constitutional
4 question and therefore is not barred by her failure to raise this claim at sentencing or on
5 appeal. In sum, because the claims in Petitioner's Petition raise constitutional questions,
6 the Court may entertain them even though Petitioner did not raise them at sentencing or on
7 appeal.

8 **II. Petitioner's Claim that Counsel Improperly Advised Her Regarding Sentencing**

9 Petitioner challenges the validity of her waiver of her right to collateral attack by
10 asserting that her counsel inadequately advised her regarding sentencing. (*See* Pet. at 1-2.)
11 The Government argues that because Petitioner was sentenced within the guideline range
12 recommended by the Government, the plea agreement signed by Petitioner prohibits her
13 from collaterally attacking her sentence. (Gov't Resp. at 20.) The Government asserts that
14 Petitioner's claim of ineffective assistance of counsel cannot evade a waiver of collateral
15 attack absent an allegation that the waiver or plea was not voluntarily or knowingly
16 entered. (*Id.* at 22.)

17 In general, a defendant who pleads guilty to a criminal charge may not later seek
18 federal habeas corpus relief on the basis of pre-plea constitutional violations. *Hudson v.*
19 *Moran*, 760 F.2d 1027, 1029-30 (9th Cir. 1985). She may, however, attack the voluntary
20 and intelligent character of the plea by demonstrating that the advice she received from
21 counsel did not constitute effective representation. *Id.* A defendant challenging a guilty
22 plea for ineffective assistance of counsel must establish that her counsel's performance was
23 deficient and that the deficient performance prejudiced her defense. *Hill v. Lockhart*, 474
24 U.S. 52, 58-59 (1985). In order to demonstrate prejudice in the plea context, the defendant
25 must show that there is a reasonable probability that, but for counsel's errors, she would not
26 have pled guilty but would have insisted on going to trial. *Id.* at 59; *United States v.*
27 *Baramdyka*, 95 F.3d 840, 844 (9th Cir. 1996).

28 Petitioner appears to challenge the voluntariness of her plea by arguing that her

counsel improperly advised her as to the potential duration of her sentence. The Court therefore reviews the record to determine whether the plea agreement, including the waiver of the right to collateral attack, was entered knowingly and voluntarily. Section XI of the plea agreement provides:

DEFENDANT WAIVES APPEAL AND COLLATERAL ATTACK

In exchange for the Government's concessions in this plea agreement, defendant waives, to the full extent of the law, any right to appeal or to collaterally attack the conviction and sentence, including any restitution order, unless the Court imposes a custodial sentence greater than the high end of the guideline range ... recommended by the Government pursuant to this plea agreement at the time of sentencing.

(Plea Agreement at 21.) The plea agreement also contains a provision certifying that Petitioner read the agreement, discussed it with her attorney, and fully understood its meaning and effect. (*Id.* at 13.) The plea agreement is signed by Petitioner and, immediately above her signature, contains language confirming Petitioner's agreement with the "foregoing provisions." (*Id.* at 22.)

At Petitioner's disposition hearing, in the presence of counsel, the Court summarized the provisions of the plea agreement and noted the maximum possible penalty for the offenses as well as the constitutional rights Petitioner was giving up. (*See Rep.'s Tr. of Disposition* at 17-23.) When asked whether she had read the plea agreement and whether someone had explained its contents to her, Petitioner stated, "[Attorney] Richard Dawson went over everything with me." (*Id.* at 7.) The Court also asked Petitioner several questions relating to the voluntariness of her plea:

THE COURT: Has anyone threatened you, your family, or friends in order to get you to plead guilty?

THE DEFENDANT: No.

THE COURT: Are you doing this freely and voluntarily?

THE DEFENDANT: Yes.

THE COURT: Do you believe you have had enough time to discuss this case with Mr. Dawson?

THE DEFENDANT: Yes, I do.

THE COURT: Other than what is contained in your plea agreement, has anyone made any other promises to you in order to get you to plead guilty?

THE DEFENDANT: No.

THE COURT: You understand that I, as trial judge, not the attorneys, will decide what the appropriate sentence in this case will be?

1 THE DEFENDANT: Yes.

2 THE COURT: Now, you will be sentenced according to the sentencing
3 guidelines. Have the sentencing guidelines that apply to your case been
4 explained to you by your attorney?

5 THE DEFENDANT: Yes.

6 (*Id.* at 21-22.) The Court also questioned Petitioner regarding her waiver of her right to
7 appeal:

8 THE COURT: You and the Government would have a right to appeal from the
9 sentence unless you waived your right to appeal under the plea agreement and
10 the terms of the plea agreement have been complied with. Do you understand
11 that?

12 THE DEFENDANT: Yes.

13 (*Id.* at 25.) The Court next questioned Petitioner to determine whether any promises or
14 predictions had been made regarding her sentence:

15 THE COURT: Has anyone made any prediction, prophecy, or promises to you
16 as to what your sentence in this case will be?

17 THE DEFENDANT: No.

18 THE COURT: Prediction, but no promise?

19 THE DEFENDANT: Prediction, but no promise.

20 THE COURT: Okay. Mr. Dawson, do you feel you have had sufficient time to
21 discuss this case with your client?

22 MR. DAWSON: Yes, your honor, I certainly have.

23 THE COURT: Other than what you stated on the record, what is contained in the
24 plea agreement, have you made any other promises or representations to your
25 client about what her sentence will be?

26 MR. DAWSON: No, I have not.

27 (*Id.* at 25.) Finally, the Court made a finding that “the Defendant is in full possession of
28 her faculties, understands the nature of the proceedings, the consequence of the plea of
guilty, understands her constitutional and trial rights, has knowingly and intelligently given
up and waived those rights.” (*Id.* at 26.)

Petitioner has failed to demonstrate that the advice she received from counsel did
not constitute effective representation. Petitioner asserts that her counsel advised her that
she would miss only one Christmas away from home, and that her counsel did not
adequately explain to her the calculation of criminal history points. (*See* Pet. at 1-2.)
Petitioner also asserts that her counsel advised her that she would “receive the same amount

1 of time as Bill Whitely, Co-defendant.” (*See* Pet. at 2.) However, these assertions are
2 directly controverted by the statements that Petitioner and her attorney made at the
3 disposition hearing. After examining the record of the disposition hearing, it is apparent
4 that Petitioner understood that only the Court could decide what the appropriate sentence in
5 Petitioner’s case would be. (Rep.’s Tr. of Disposition at 21-22.) Both Petitioner and her
6 counsel stated to the court that no promises had been made to Petitioner regarding her
7 potential sentence. (*Id.* at 25.) Petitioner confirmed that she had sufficient time to discuss
8 her case with her counsel, and that her counsel had explained to her the sentencing
9 guidelines that applied to her case. (*Id.*) The record thus undermines Petitioner’s claim
10 that counsel was ineffective for improperly advising her as to her sentence.

11 Petitioner has also failed to demonstrate that she was prejudiced by counsel’s
12 alleged deficient performance. Petitioner’s plea ultimately resulted in a sentence of 41
13 months in custody. (Rep.’s Tr. of Sentencing at 12.) Without a plea agreement, Petitioner
14 would have faced a sentence of 61 to 63 months in custody. (*See* Rep.’s Tr. of Disposition
15 at 23.) These facts preclude a reasonable claim that absent counsel’s alleged erroneous
16 advice, Petitioner would have insisted on going to trial. The Court thus **DENIES**
17 Petitioner’s first ineffective assistance of counsel claim because the record shows Petitioner
18 voluntarily and knowingly entered into the plea agreement.

19 **III. Petitioner’s Claim that Counsel Was Ineffective for Failing to Object to the**
20 **Sentencing Adjustments**

21 Petitioner asserts that her counsel was ineffective at sentencing for failing to object
22 to: (1) the fourteen-point enhancement she received due to the amount of loss caused by her
23 offense; (2) the two-point enhancement she received due to the vulnerable nature of her
24 victims; and (3) the two-point enhancement she received due to her supervisory role in the
25 offense. (Pet. at 2-3.) In opposition to this claim, the Government notes that Petitioner
26 stipulated to the enhancements in her plea agreement, and that counsel effectively
27 represented Petitioner by negotiating reduced charges and a favorable sentencing
28 recommendation. (Gov’t Resp. at 24.)

1 To prevail on her ineffective assistance of counsel claim, Petitioner must show that
2 her counsel's performance was deficient at sentencing, and this deficient performance
3 prejudiced her. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish
4 prejudice, Petitioner must show that there is a reasonable probability that, but for counsel's
5 unprofessional errors, the result of the proceeding would have been different. *Id.* at 694.
6 "A reasonable probability is a probability sufficient to undermine confidence in the
7 outcome." *Id.* However, "failure to raise a meritless legal argument does not constitute
8 ineffective assistance of counsel." *Shah v. United States*, 878 F.2d 1156, 1162 (9th Cir.
9 1989).

10 Petitioner has failed to demonstrate that counsel was deficient for failing to object to
11 the sentencing enhancements. In the plea agreement, Petitioner expressly stipulated to the
12 three enhancements at issue. (*See* Plea Agreement at 15.) If counsel had objected to these
13 enhancements at Petitioner's sentencing hearing, he would have violated the plea
14 agreement because Petitioner had specifically agreed to them. In addition, Petitioner has
15 failed to set forth a plausible theory under which her counsel could have objected to the
16 enhancements. Petitioner appears to assert that counsel should have objected on the basis
17 that the Court improperly engaged in judicial factfinding. (*See* Pet. at 3.) However,
18 Petitioner admitted the facts supporting the imposition of the enhancements in her plea
19 agreement and during her disposition hearing. (*See generally* Plea Agreement at 4-11;
20 Rep.'s Tr. of Disposition at 11-17.) It would have been illogical for Petitioner's counsel to
21 object to the enhancements on the grounds that a jury, and not a judge, was required to find
22 the facts supporting the enhancements, when Petitioner had already expressly admitted to
23 these facts. Counsel's failure to raise the meritless legal argument that a jury was required
24 to find the facts leading to the enhancements does not constitute ineffective assistance of
25 counsel. *See Shah*, 878 F.2d at 1162. Further, counsel made several legitimate arguments
26 in support of reducing Petitioner's sentence. For example, counsel argued that Petitioner
27 was eligible for a substantial reduction under U.S.S.G. § 5K1.1 because her cooperation
28 was a significant factor in persuading her co-defendants to plead guilty. (Rep.'s Tr. of

1 Sentencing at 6.) In addressing Petitioner's criminal history score, counsel emphasized that
2 Petitioner's driving under the influence convictions did not involve collisions or injuries
3 and were unrelated to her conduct in the instant case. (*Id.* at 8.) Counsel also discussed the
4 difficulties Petitioner faced as a child, the support of her family, and her acceptance of
5 responsibility. (*Id.* at 10.) Because Petitioner has failed to establish that counsel's
6 performance at sentencing fell below an objective standard of reasonableness, the Court
7 **DENIES** Petitioner's second ineffective assistance of counsel claim.

8 **IV. Petitioner's Claim that Her Constitutional Rights Were Violated by Misuse of the**
9 **Patriot Act**

10 Petitioner asserts that her constitutional rights were violated by misuse of the Patriot
11 Act. (Pet. at 3.) Specifically, Petitioner asserts that there were "unlawful wiretaps and
12 misuse of information obtained illegally." (*Id.*) However, as noted in Section II of this
13 Order, a petitioner who pleads guilty to a criminal charge may not subsequently seek relief
14 on the basis of pre-plea constitutional violations. *Hudson*, 760 F.2d at 1029-30. When a
15 petitioner has "solemnly admitted in open court" that she is in fact guilty of the offense
16 with which she is charged, she may not later raise claims regarding the deprivation of
17 constitutional rights that occurred prior to the entry of the guilty plea. *See Tollett v.*
18 *Henderson*, 411 U.S. 258, 267 (1973). The petitioner "may only attack the voluntary and
19 intelligent character of the guilty plea." *Id.* The Court has already determined that, based
20 on the text of the plea agreement and the record of the disposition hearing, Petitioner
21 voluntarily and knowingly entered into the plea agreement. Because the alleged misuse of
22 the Patriot Act does not involve the voluntariness of Petitioner's plea, and because the
23 alleged constitutional violation occurred before Petitioner entered into the plea agreement,
24 the Court **FINDS** that Petitioner's claim regarding the Patriot Act is barred.

25 **V. Petitioner's Claim that the Sentencing Enhancements Violated Her Right to Trial**
26 **by Jury**

27 Petitioner appears to assert that the sentencing enhancements the Court imposed
28 violated her Sixth Amendment right to trial by jury. (Pet. at 3-4.) Specifically, Petitioner

1 asserts that “[f]acts of enhancement were used in the plea agreement and were in the PSR,
2 but not admitted by the Defendant. Thus they were inferred by the Judge in sentencing the
3 Defendant.” (Pet. at 4.) In opposition, the Government argues that Petitioner admitted to
4 the facts that led to the sentencing enhancements. (Gov’t Resp. at 27.) In addition, the
5 Government asserts that under the circumstances of this case, any factfinding conducted by
6 the Court did not violate the Sixth Amendment. (*Id.*)

7 “Judicial factfinding does not, on its own, violate the Sixth Amendment, even when
8 that factfinding is the basis for enhancing a defendant’s sentence.” *See United States v.*
9 *Fifield*, 432 F.3d 1056, 1066 (9th Cir. 2005). A judge may enhance a sentence based on
10 judicial factfinding so long as the sentence does not exceed the statutory maximum
11 imposed solely on the basis of the facts admitted by the defendant. *See id.*

12 In her plea agreement, Petitioner admitted to facts that were the basis for enhancing
13 her sentence. (*See generally* Plea Agreement at 4-11.) Additionally, Petitioner’s counsel
14 stated the facts supporting the enhancements during the disposition hearing. (*See generally*
15 Rep.’s Tr. of Disposition at 11-17.) Petitioner confirmed that the facts recited by her
16 attorney were true. (*Id.* at 17.) Accordingly, Petitioner has failed to set forth any facts that
17 were independently found by the Court, rather than being admitted to by Petitioner. Her
18 argument that the Court conducted factfinding in violation of her Sixth Amendment rights
19 is therefore without merit.

20 Even if the Court made factual findings independent of the facts Petitioner admitted,
21 those findings did not increase Petitioner’s statutory maximum sentence. (*See* Rep.’s Tr. of
22 Disposition at 20-21.) At the time of Petitioner’s disposition hearing, the statutory
23 maximum term of imprisonment for a conviction of conspiracy to commit securities fraud
24 was five years. *See* 18 U.S.C. § 371 (2002). Similarly, the statutory maximum term of
25 imprisonment for a conviction of mail fraud or a conviction of wire fraud was five years.
26 *See* 18 U.S.C. §§ 1341, 1343 (2002). The statutory maximum term of imprisonment for a
27 conviction of securities fraud was ten years. *See* 15 U.S.C. § 78ff (2002). Petitioner was
28 sentenced to 41 months in custody. (Rep.’s Tr. of Sentencing at 12.) Because this sentence

1 did not exceed the statutory maximum for any of the offenses to which Petitioner pleaded,
 2 any factfinding conducted by the Court did not violate Petitioner's Sixth Amendment
 3 rights. *See Fifield*, 432 F.3d at 1066. The Court thus **FINDS** that Petitioner's claim that
 4 the Court conducted factfinding in violation of the Sixth Amendment is without merit.

5 **VI. Evidentiary Hearing**

6 A district court may not deny a 28 U.S.C. § 2255 petition without a hearing
 7 "[u]nless the motion and the files and records of the case conclusively show that the
 8 prisoner is entitled to no relief." 28 U.S.C. § 2255 (2000). In order for a petitioner to
 9 qualify for an evidentiary hearing, she must "make specific factual allegations which, if
 10 true, would entitle [her] to relief." *Baumann v. United States*, 692 F.2d 565, 571 (9th Cir.
 11 1982). "[N]o hearing is required if the allegations, viewed against the record, either fail to
 12 state a claim for relief or are so palpably incredible or patently frivolous as to warrant
 13 summary dismissal." *Shah v. United States*, 878 F.2d 1156, 1158 (9th Cir. 1989) (internal
 14 quotations omitted).

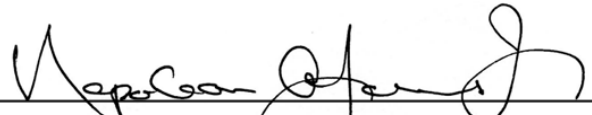
15 Here, Petitioner's § 2255 Petition and the record conclusively show that Petitioner is
 16 entitled to no relief. Further, there are no factual disputes for which an evidentiary hearing
 17 would be needed to develop the record. The Court therefore declines to hold an evidentiary
 18 hearing in this matter.

19 ***Conclusion***

20 For the reasons stated above, the Court **DENIES** Petitioner's Petition for Writ of
 21 Habeas Corpus under 28 U.S.C. § 2255.

22 **IT IS SO ORDERED.**

23 DATED: August 3, 2007

24 
 25 HON. NAPOLEON A. JONES, JR.
 United States District Judge

26 cc: All Parties
 27
 28